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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1961

No. 667

In the Matter of the Petition of Moore-McCormack Lines, Inc. as Owner of the S.S. "Mormackite" for Exoneration from or Limitation of Liability.

JEAN O. RICHARDSON, Individually and as Executrix of the Estate of HAROLD H. RICHARDSON *et al.*,

Petitioners,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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This is an application made pursuant to Rule 58 of the Rules of the Supreme Court of the United States for a rehearing of a petition for certiorari made by petitioners Rosario, DeJesus, Hernandez, Henry, Sullivan, Del Valle, Williams, Cadiz and Berk, seamen and representatives of deceased seamen, suing in admiralty to recover damages for personal injuries to review the judgment of the Court of Appeals for the Second Circuit, in part reversing

and in part modifying, a District Court decree in their favor. Their original petition had been denied on February 19, 1962. The present application, not joined by original petitioners Richardson and Wall, is made in order to bring to the Court's attention matters that had not been brought to the Court's attention in the original petition.

1. In this case, the compensation for pain and suffering of the seamen while clinging to wreckage in the ocean for some fifty hours before being rescued was evaluated by the District Court at $300.00 an hour. The District Court made its evaluation on the basis of the evidence before it which included the inseparable and necessary evidentiary factor of the observable effects of the experiences on the minds and bodies of those who underwent them. The Court of Appeals, without assigning any reason for its conclusion other than it thought the award was too much, reduced the District Court's evaluation to $150.00 an hour, so doing without seeing or hearing the men so as to observe the effects of the experience on them. In other words it did not consider evidence that was available to it in deciding an admiralty cause.

Petitioners submit that this was a denial of due process under the Fifth Amendment to the Constitution of the United States.

It has been held that there is a denial of due process when a fact finding tribunal does not utilize or consider available evidence for, as has been said, "One who decides must hear". *Morgan* v. *U. S.*, 298 U. S. 468, 481. It is equally a denial of due process when the evidence not considered is demeanor evidence. *S. Buchsbaum & Company* v. *Federal Trade Commission*, 153 Federal 2d 85 (7th Cir.).

The Court of Appeals in reversing factual findings of a District Court, sitting in admiralty, acts as a fact finding tribunal. Accordingly, when it makes new findings of fact without utilizing available evidence, there is a denial of due process.

In this case, the Court of Appeals in evaluating the seamens' pain and suffering at $150.00 an hour, without the benefit of observation or examination of the seamen, so necessary to determine what the effects of their sufferings were upon them, was not considering available evidence in making its new findings of fact.

Were this a case of rate regulation, there could be no question of denial of due process were the rate fixed without giving consideration or weight to significant factors. *Southwestern Bell Telephone Company* v. *Public Service Commission of Missouri*, 262 U. S. 276. There is no perceivable difference in principle when a "rate" for pain and suffering is fixed without giving consideration and weight to such significant factors as the observable effects of the occurrence on the individuals involved, factors which could only be evaluated and weighed by a personal scrutiny and examination of those involved.

It is, therefore, submitted that the judgment of the Court of Appeals, reducing the District Court's evaluation of the compensation the men were entitled to for pain and suffering, without giving consideration to all the available evidence, was arbitrary and capricious so as to constitute a denial of due process.

2. The composition of the Court of Appeals was the Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Circuit Judge, and Hon. J. Warren Madden, Judge of the United States Court of Claims, sitting by designation. The composition of the Court is identical to that in the case of *The Glidden Company etc.* v. *Olga Zdanok*, No. 242 in which certiorari has been granted with respect to the point that the participation of Judge Madden vitiated the Court of Appeals decision. That appeal is presently sub judice. The only difference between the *Glidden* case and the instant case is that in the former the decision was non-unanimous, with Judge Madden writing the prevailing opinion, while the decision in this case was unanimous with Judge Lumbard writing the opinion of the Court.

If it be held that the participation of Judge Madden in the *Glidden* case nullifies the judgment of the Court of Appeals, then the same should be held in the instant case. This point was not brought to the Court's attention on the original petition. The reasons which led to the granting of certiorari in the *Glidden* action should lead to the granting of certiorari in this case.

It is, therefore, respectfully submitted that petitioners' application for a rehearing of their application for certiorari should be granted and upon such re-hearing certiorari granted with respect to either of the following questions, or both:

1. Was there a denial of due process in the Court of Appeals' reduction of the District Court's award for pain and suffering?

2. Did Judge Madden's participation in the hearing of the appeal nullify the judgment of the Court of Appeals?

Respectfully submitted,

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Attorney for Petitioners

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LOUIS R. HAROLDS
Of Counsel

I hereby certify that the within petition is presented in good faith and not for delay.

BENJAMIN H. SIFF